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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 303

MARATHON OIL COMPANY, *Petitioner*

v.

BROOKLYN UNION GAS COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Marathon Oil Company (formerly The Ohio Oil Company and hereinafter referred to as "Ohio"),[1] by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on February 14, 1962, in *Socony Mobil Oil Company* v. *Brooklyn Union Gas Company*, 299 F. 2d 692.

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[1] On August 1, 1962, the corporate name of The Ohio Oil Company was changed to Marathon Oil Company. In all other respects, the corporate entity and status of the company remained the same. For convenience, however, particularly since it was referred to as "Ohio" in the decisions of both of the courts below, that reference will be utilized throughout this petition.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 834; App. A; *infra*, pp. 1a-7a)[2] is reported at 299 F. 2d 692. The opinions of the district court (R. 651, 754; App. A, *infra*, pp. 8a-19a, 20a-28a), adopted in substance by the Court of Appeals, are reported at 201 F. Supp. 673 and 679.

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1962 (R. 844; App. A, *infra*, p. 29a). A petition for rehearing, timely filed, was denied on May 21, 1962 (R. 908; App. A, *infra*, p. 30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 4 of the Natural Gas Act, which requires that notice be filed with the Federal Power Commission, *under such rules and regulations as the Commission may prescribe*, is a self-executing statutory provision which justifies a recovery in restitution of price increases collected without giving such notice during the effective period of a court order staying the rules and regulations issued by the Commission.

2. Whether utility customers of an interstate gas pipeline, which purchases a portion of its gas supply from an independent producer, may recover directly from that producer price increases collected during the

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[2] Throughout this petition the citation "R." will refer to the Transcript of Record certified by the clerk of the Court of Appeals, which is being filed with this Court with the petition for a writ of certiorari concurrently filed by Socony Mobil Oil Company. "App." citations refer to Appendix A or Appendix B, hereto annexed.

period of a court stay of applicable Federal Power Commission regulations on the ground that the producer did not file the notices required by the stayed regulations, in the light of this Court's decisions in the *Montana-Dakota* and *Atlantic Coast Line* cases, particularly when the price increases collected were the same as those allowed by the Commission to another producer for its share of the same gas, when the same prices were subsequently allowed to the producer from whom the recovery is sought, and when there has been no determination by the Commission that the prices collected were not "just and reasonable" under the Natural Gas Act.

3. Whether, if the aforementioned price increases were unlawful when collected, the claim for recovery is now barred by the applicable statute of limitations, and, on the other hand, if the claim is not barred by limitations, whether interest may be allowed for any period prior to the date the purported cause of action for restitution arose.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Natural Gas Act of June 21, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 et seq., and of Federal Power Commission Order No. 174-A, 19 F.R. 5081, 18 CFR, Parts 154 and 157, which implemented the Act, are set forth in Appendix B, *infra*, pp. 31a-38a.

STATEMENT

On August 6, 1954, following this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, the Federal Power Commission issued its Order

No. 174-A, 19 F.R. 5081.[3] That order, issued for the purpose of implementing Sections 4 and 7 of the Natural Gas Act, 15 U.S.C. 717c and 717f, purported to prescribe the Commission's rules and regulations governing interstate sales of natural gas by "independent producers." Ohio, the petitioner herein, was and is an "independent producer" within the meaning of that term as used in the Commission's order.

On November 5, 1954, Ohio instituted proceedings in the United States Court of Appeals for the Fifth Circuit seeking review of Order No. 174-A under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). In these proceedings, Ohio challenged the validity of Order No. 174-A on the ground that certain provisions thereof exceeded the statutory powers of the Commission under the Natural Gas Act (R. 220). This challenge was directed particularly to the provisions of the Order which purported to define a fixed price escalation in a pre-existing contract as a "change in rate," within the meaning of Section 4 of the Act, and prohibited such escalations from becoming effective except after 30 days' notice to the Commission (R. 220-221, 252, 570).[4]

In connection with the review proceedings, Ohio requested and the Court of Appeals granted to Ohio,

[3] Order No. 174-A superseded and revised, in certain respects, Order No. 174, issued July 16, 1954, 19 F.R. 4594. Order No. 174-A was subsequently superseded by Order No. 174-B, issued December 17, 1954, 19 F.R. 8807, with which we are not concerned in the present litigation. See *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785, at 789 (C.A. 5, 1956), cert. den. 352 U.S. 968.

[4] The provisions referred to were subsequently codified as 18 CFR 154.94(a), (b) and (c). App. B, *infra*, p. 37a.

under date of November 16, 1954, a stay of Order No. 174-A pending final outcome of the litigation (R. 124). This stay, as subsequently continued, remained in effect until February 1, 1957 (R. 127, 222, 576). In issuing the stay, the Court required no bond of Ohio, nor did it impose any refund condition, and no such bond or condition was requested or even suggested by the Federal Power Commission, although all parties were advised as to the status of Ohio's scheduled price increases (R. 70, 573, 575).

On June 30, 1956, the Court of Appeals dismissed Ohio's petition for review for lack of jurisdiction, on the ground that Order No. 174-A was not a "reviewable order" under Section 19(b) of the Natural Gas Act. *The Ohio Oil Company* v. *Federal Power Commission*, No. 15321, reported *sub nom. Magnolia Petroleum Company, et al.* v. *Federal Power Commission*, 236 F. 2d 785 (C.A. 5, 1956). On January 14, 1957, this Court denied certiorari. *Magnolia Petroleum Company, et al. v. Federal Power Commission*, 352 U.S. 968.

When Order No. 174-A was issued in August 1954, there was then in effect a 20-year contract, dated April 30, 1948, under which Ohio was selling natural gas to Transcontinental Gas Pipe Line Corporation ("Transco") from the North Markham-North Bay City Field, Matagorda County, Texas (R. 571). The parties seller under this single contract were both Ohio and Sun Oil Company ("Sun"), the field being a unitized field, with Ohio and Sun each owning undivided interests in the gas produced from each well and leasehold in the field (R. 224-225, 577).

The Sun-Ohio contract with Transco contains provision for periodic and tax reimbursement price in-

creases which become effective from time to time (R. 571-573). Subsequent to June 7, 1954, the date of the *Phillips* decision, and prior to the expiration of the court stay on February 1, 1957, fixed price increases of this nature, in the net amount of approximately one cent per Mcf, occurred under the contract. These increases were collected by Ohio and paid by Transco as they became due, without Ohio's having first filed with the Federal Power Commission the 30 days' notice prescribed in the stayed Order No. 174-A (R. 576).

Under date of January 25, 1957, immediately prior to the expiration of the stay of Order 174-A,[5] Ohio filed with the Federal Power Commission its FPC Gas Rate Schedule No. 10, covering the sale of gas here involved (R. 576). This filing, when made, consisted of the basic Sun-Ohio contract of April 30, 1948, and supplements thereto, including supplements covering the price increases which had been placed in effect under the contract during the period of the court stay (R. 228, 576). In acting on this filing, the Commission not only accepted the basic contract, but also *allowed to Ohio, without suspension, the full amount of the price increases which had taken place under the contract while the stay of Order No. 174-A was in effect* (R. 577).[6] Moreover, these same price increases had previously been allowed to Sun Oil Company, as they became due under the contract, in action taken by

[5] The stay expired by its own terms on February 1, 1957, the date upon which, following this Court's denial of certiorari, the judgment of the Court of Appeals was certified to the Federal Power Commission (R. 575).

[6] This important fact is not mentioned in the opinions of either the Court of Appeals (299 F. 2d 692) or the district court (201 F. Supp. 673; 201 F. Supp. 679). App. A, *infra*, pp. 1a, 8a, 20a.

the Commission on Sun's FPC Gas Rate Schedule No. 27, consisting of the same Sun-Ohio contract of April 30, 1948, and covering gas sold to the same purchaser from the same wells in the same field (R. 578).

The present litigation was instituted in the United States District Court for the Southern District of Texas on January 10, 1959 (R. 31).[7] The plaintiffs were The Brooklyn Union Gas Company ("Brooklyn Union") and some nine other distributors of natural gas who were alleged to be customers of Transco. The actions were instituted against Transco, Ohio and Magnolia Petroleum Company, now Socony Mobil Oil Company ("Mobil").[8] The recovery sought by the plaintiffs, as against Ohio, was a total sum, plus interest, allegedly representing the difference between the amounts paid by Transco to Ohio as contract prices for gas delivered from the North Markham-North Bay City Field, between February 1, 1955, and January 31, 1957, and the lower theoretical amounts which would have been paid for such gas on the basis of the price in effect on June 7, 1954 (R. 49).

The consolidated cases were submitted to the district court on motions for summary judgment filed by all parties. In two memorandum opinions issued June 29, 1960, and November 23, 1960, *Brooklyn Union Gas Co.* v. *Transcontinental Gas P. L. Corp.*, 201 F. Supp. 673 and 201 F. Supp. 679, respectively, the district court ordered judgment entered in favor of the plain-

[7] A separate complaint filed in a state court by one of the plaintiffs, Delaware Power & Light Company, was subsequently removed to the federal court (R. 144).

[8] Mobil is the party seller under another contract with Transco, involving gas produced from the West Gueydan Field, Vermilion Parish, Louisiana.

tiffs and Transco and against Ohio and Mobil (R. 651, 655, 754, 763; App. A, *infra*, pp. 19a, 28a).

In its opinion of June 29, 1960, 201 F. Supp. 673, the district court held that, under the Court stay of Order No. 174-A, the contract prices collected by Ohio during the stay, without making filings with the Federal Power Commission, were *lawfully* collected (R. 661; App. A, *infra*, p. 16a), but that, when the stay terminated, Ohio was under an obligation to refund the amounts so collected and that the plaintiffs were entitled to recover such amounts from Ohio under the doctrine of restitution (R. 663; App. A, *infra*, pp. 17a-18a). In so holding, the district court found that the only "lawful" rate in effect during the stay was the June 7, 1954, rate "as established by order of the Federal Power Commission," i.e., Order No. 174-A (R. 662; App. A, *infra*, p. 16a), notwithstanding its earlier holding that the prices collected by Ohio during that period were "lawfully" collected (R. 661; App. A, *infra*, p. 16a). In addition, the claims asserted by the plaintiffs were held not to be barred by the Texas two-year statute of limitations, the court being of the view that the cause of action for restitution did not arise until the termination of the stay on February 1, 1957, less than two years prior to the institution of these proceedings (R. 661; App. A, *infra*, p. 16a).

Final judgment was entered by the district court on January 16, 1961 (R. 779).

The decision of the district court was the subject of four separate appeals to the Court of Appeals for the Fifth Circuit,[9] the matter being presented on a

[9] Causes No. 18941, 18942, 18943 and 18944, Ohio's appeal being Cause No. 18942.

single printed record, with each case briefed and argued separately (R. 10).

In a decision rendered February 14, 1962, the Court of Appeals, in essence, adopted the decisions of the district court, and affirmed the judgment below in each of the four appeals. *Socony Mobil Oil Company* v. *Brooklyn Union Gas Company*, 299 F. 2d 692, App. A, *infra*, p. 1a.. With respect to Ohio's case, the Court of Appeals held, in effect, that Ohio's collection of its price increases, without first making filings with the FPC, was a violation of Section 4 of the Natural Gas Act, 15 U.S.C. 717c, with the result that such increases must be refunded by Ohio, notwithstanding the fact that the regulations implementing the Act, and the filing requirements in those regulations, had been stayed by the court during the period of collection.

Timely petitions for rehearing, filed by all parties, were denied on May 21, 1962 (R. 908; App. A, *infra*, p. 30a).

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION WHICH SHOULD BE RESOLVED BY THIS COURT

The decisions of the district court and the Court of Appeals award to the plaintiffs a recovery of the price increases collected by Ohio during the stay of Order No. 174-A on the sole ground that such increases were collected by Ohio without first filing notice thereof with the Federal Power Commission. This holding was made despite the fact that, throughout the period in question, the filing requirements of Order No. 174-A (18 CFR 154.92 and 154.94; App. B, *infra*, pp. 35a,

37a), promulgated in implementation of Section 4 of the Natural Gas Act, 15 U.S.C. 717c, had been effectively and completely stayed by an order of the Court of Appeals. In essence, therefore, the decisions below hold that Ohio's collection of its price increases, without first filing notices thereof, was unlawful because it was a violation of Section 4 of the Act. This is made clear by the following excerpt from the opinion of the Court of Appeals (App. A, *infra*, p. 3a):

> "* * * As he [the district court] further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates * * *."

It is Ohio's position that the foregoing is an erroneous interpretation of the effect of Section 4 of the Natural Gas Act, which, in turn, has resulted in an erroneous holding as to the right of the plaintiffs to recover the judgment awarded in their favor.

Section 4 of the Natural Gas Act, 15 U.S.C. 717c, is not a self-executing statutory provision. Indeed, it provides, in plain language, that it shall become operative only through rules and regulations promulgated by the Federal Power Commission, and this is true in respect to both the initial rate filing requirement (18 CFR 154.92) and the notice of rate change requirement (18 CFR 154.94).

Section 4(c) of the Act (App. B, *infra*, p. 31a) provides, in part:

> "(c) *Under such rules and regulations as the Commission may prescribe,* every natural-gas company shall file with the Commission * * * sched-

> ules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *. (Emphasis added)

Immediately following this provision, Section 4(d) provides, in part (App. B, *infra*, pp. 31a-32a):

> "(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in *any such rate* * * *except after thirty days' notice t othe Commission and to the public. *Such notice shall be given by filing* with the Commission * * * new schedules stating plainly the change or *changes to be made in* the schedule or *schedules then in force* * * *. (Emphasis added).

Section 4 of the Act must, of course, be read as a whole. When so read, it is clear that the "change" provision in Section 4(d) relates only to changes in schedules "then in force" under Section 4(c), and all filings, both of initial rate schedules and of changes in such schedules, are required only *"under such rules and regulations as the Commission may prescribe."* See also Section 16 of the Act, 15 U.S.C. 717o.

When Ohio collected the contract price increases here involved, the only applicable rules and regulations prescribed by the Commission in implementation of the filing provisions of Sections 4(c) and 4(d) of the Act were those contained in Order No. 174-A. But this order had been stayed by the Court of Appeals and was not applicable to Ohio. As a consequence, the effect of the stay of Order No. 174-A was to stay also the filing requirements of Section 4 of the Act and this was conceded by all parties to the proceedings below. Ohio's collection of its price increases without filing notices thereof was therefore not illegal or un-

lawful and the plaintiffs have no right to recover these monies from Ohio.

The decision of the Court of Appeals holds, however, that, apart from the effect of the stay of Order No. 174-A, Ohio's collection of its price increases, without making filings with the Commission, was in violation of Section 4 of the Act and was thus unlawful in any event (see p. 10, *supra*). This, we submit, is a patently wrong interpretation which has never been given to the Natural Gas Act by this Court.

The question of statutory construction here presented is one of great importance not only to the parties to this litigation, but also to the Federal Power Commission in its administration of the Natural Gas Act and to the vast number of pipe lines, producers, distributors and members of the consuming public affected by regulation under the Act. Is or is not Section 4 of the Act a self-executing provision? This is an important question of federal law which has not, but should be, resolved by this Court.

II

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN THE MONTANA-DAKOTA CASE

A further reason why certiorari should be granted in this case is the fact that the decision of the court below presents a sharp conflict with this Court's decision in *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U.S. 246.

The *Montana-Dakota* case arose under the Federal Power Act, 16 U.S.C. 824, *et seq.*, but the regulatory provisions and limitations therein prescribed closely parallel those of the Natural Gas Act. Of particular significance, however, are the factual circumstances

existing in that case. There, *Montana-Dakota* brought suit to recover for excess charges collected by Northwestern on the ground that those charges were illegal, because Northwestern failed to comply with the filing provisions of the Act, failed to give the 30-days' notice required by the Act, and was fraudulent in its actions with respect to such filings as were made (see *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19 (C.A. 8, 1950), at 20, 23; see also 341 U.S. at 258). The first two of these grounds, predicated on alleged violations of the filing requirements of the Act, are thus the same as those adopted by the court below as the basis for the judgment against Ohio in the present case (App. A, *infra*, p. 3a). Nevertheless, and notwithstanding the existence of the additional charge of fraud, this Court denied recovery to Montana-Dakota, holding that, under the Act, neither the Commission nor a court is authorized to award recovery of illegal rates collected in the past.[10] See 341 U.S. at 253-254. See also and compare *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464.

A major consideration in this Court's decision in *Montana-Dakota* was the "windfall" which would have been received by the plaintiff in that case in the event

[10] Under the Natural Gas Act, the Commission possesses certain refund powers, but they are limited to monies collected subject to bond or undertaking imposed under the provisions of Section 4(e), 15 U.S.C. 717c(e), App. B, *infra*, pp. 32a-33a, or under a condition attached to the granting of a temporary certificate issued under Section 7(c) and 7(e), 15 U.S.C. 717f(c) and 717f(e). In the present case, it is to be noted that the Commission opposed the stay granted to Ohio and filed a motion to vacate it (R. 567, 579), but neither the Commission nor the court suggested, at any time, that any bond or other refund condition should be attached to the stay.

of a recovery, this being a matter brought to the Court's attention in the brief *amicus curiae* filed by the Federal Power Commission. See 341 U.S. at 254, fns. 10, 11.[11] The Court was impressed by the fact that the plaintiff, a public utility, had passed on to its customers any excessive rates it might have paid in previous years and there was no assurance that those customers would receive any benefits from any refund which might be ordered. The same situation exists in the present case. As in *Montana-Dakota*, any price increases which may have been passed on to the present plaintiffs as a result of Ohio's price increases were, in turn, passed on by the plaintiffs to their customers, and there is no showing in the record of this case that any part of the recovery now awarded by the court below will be, or could be, passed on by the plaintiffs to the consumers who received the gas in 1955 and 1956.

In the light of the foregoing, it is clear that the recovery awarded to plaintiffs by the court below is contrary to what this Court said and did in the *Montana-Dakota* case.

III

THE JUDGMENT IN THIS CASE REPRESENTS A DEPARTURE FROM ACCEPTED PRINCIPLES OF LAW AS ESTABLISHED BY THIS COURT IN ATLANTIC COAST LINE v. FLORIDA

The judgment entered by the district court and affirmed by the Court of Appeals awards recovery to the plaintiffs under a purported application of the doctrine of restitution. The result reached, however, reflects a complete disregard for the controlling principles of restitution. These principles, well established

[11] See also the dissenting opinion in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, at 491.

in the law, are (1) there must be an unjust enrichment of the defendant and a consequent financial injury to the plaintiff (Restatement, Restitution, Sec. 1)[12] and (2) a court will not award restitution if the equities of the case do not require it. *Stone* v. *White*, 301 U.S. 502, 536; *Atlantic Coast Line* v. *Florida*, 295 U.S. 301, 309-310.

The decision below contravenes, in particular, the principles announced by this Court in the *Atlantic Coast Line* case. In that case, restitution was sought for the difference in freight rates paid while an invalid order of the Interstate Commerce Commission was in effect. This Court held that recovery should be denied because the circumstances of the case did not justify the affirmative exercise of a court's equitable powers to grant restitution. Speaking through Mr. Justice Cardozo, this Court said (295 U.S. at 314-315):

> "We think the better view is that in the light of its present knowledge the court will stay its hand and leave the parties where it finds them. * * *
>
> "* * * It does not undertake to say that the rates collected by the carrier were lawful in the sense that a suit would lie to recover them if credit had been given to the shipper and a balance were now unpaid. All that the federal court does is to announce that it will stand aloof. It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. *In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances reliev-*

[12] See also Thurston, Edward S., *Recent Developments in Restitution: 1940-1947*, 45 Michigan L. Rev. 935, 936-937 (1947).

ing the carrier of any stigma of extortion. It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays. Learning those things, it says no more than this, that *irrespective of legal rights and remedies, it will not intervene affirmatively,* in the exercise of its equitable and discretionary powers, to change the *status quo.* * * * (Emphasis added)

In the present case, all of the equities favor Ohio. Some of these equities—which, we submit, are controlling—are as follows:

(a) Ohio collected its contract prices, and no more,[13] and there has at no time been a determination by the Commission that these prices were not "just and reasonable" prices.[14]

(b) The prices collected by Ohio were the same as those collected by Sun Oil Company for gas sold to the same purchaser, under the same contract, from the same wells, in the same field (R. 578).

(c) The prices collected were the same as those allowed to Ohio by the Commission when Ohio made its filings at the termination of the stay (R. 577).

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[13] This important fact distinguishes the present case from such common-law contract cases as *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656; *Pan American Petroleum Corp.* v. *Kansas Nebraska Natural Gas Co.*, No. 823, October Term, 1961; and *Pipeline Co. of America* v. *Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957 (relied on by the court below), in all of which the recovery sought was for amounts collected in excess of contract prices.

[14] The "just and reasonable" standard is the only standard of lawfulnes prescribed in the Natural Gas Act. See Section 4(a), 15 U.S.C. 717c(a), App. B, *infra*, p. 31a.

(d) Neither the Court of Appeals, the Commission (which represented the plaintiffs and all of the public), nor the plaintiffs themselves[15] sought or even suggested the attachment of a refund condition which would have preserved the necessary jurisdiction and any rights to a refund which might have existed.

(e) The judgment below would result in a "windfall" to plaintiffs. See pp. 13-14, *supra*.

In view of the foregoing, it is clear that Ohio's collection of its price increases during the stay did not result in any financial injury to the plaintiffs. An essential prerequisite to restitution is therefore absent. It is also clear that an award of restitution in the factual circumstances of this case violates the principles established by this Court in the *Atlantic Coast Line* case.

IV

THE LOWER COURT'S DECISION INVADES THE DOMAIN OF ADMINISTRATIVE ACTION

The decisions of both the Court of Appeals and the district court assert that, in awarding a recovery of the amounts collected by Ohio in excess of the June 7, 1954 rate, the court is "not fixing any just or reasonable rate." App. A, *infra*, pp. 4a, 16a-17a. We submit, however, that this is exactly what the Court below has done.

As has been noted, *supra*, p. 16, fn. 14, the only standard of lawfulness prescribed in The Natural Gas Act is the "just and reasonable" standard. Section 4(a), 15 U.S.C. 717c(a); App. B, *infra*, p. 31a. More-

[15] The plaintiffs were not parties to the review proceedings but they were fully advised as to the stay (R. 70) and could have intervened or could have filed representations *amici curiae*.

over, under the Act, only the Federal Power Commission is empowered to determine whether a rate is or is not "just and reasonable," and its determination in this respect may be made only on the basis of an administrative hearing and findings conducted and made under either Section 4 or Section 5 of the Act. 15 U.S.C. 717c, 717d.

In the present case, the Commission has at no time made a determination that Ohio's rate in effect on June 7, 1954, was or was not a "just and reasonable" rate.[16] In like manner, it has not determined that the increased rates thereafter collected during the stay were not "just and reasonable." Moreover, there has been no showing in this case, or even a single allegation in any of the pleadings, that Ohio's increased rates were not "just and reasonable."

In restitution, the measure of recovery is the extent, if any, to which the defendant may have been *unjustly* enriched at the expense of the plaintiff. See p. 15, *supra*. As a consequence, the most that the district court could award to plaintiffs, by way of restitution, would be the difference, if any, between the contract prices collected by Ohio and what might be determined

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[16] The district court held that Order No. 174-A established Ohio's June 7, 1954, rate as the "lawful" rate. 201 F. Supp. at 678; App. A, *infra*, p. 16a. This is obviously not the law, since Order No. 174-A was not predicated on the requisite hearings, findings and determination made under Section 4 or Section 5 of the Act, and, therefore, could not operate as a rate fixing order. Moreover, this was the reason why the Court of Appeals held that Order No. 174-A was not a reviewable order. In dismissing Ohio's petition for review, the court agreed with counsel for the Commission that Order No. 174-A was procedural in nature only and did not determine any of Ohio's substantive rights. See *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785, at 791 (C.A. 5, 1956), cert. den. 352 U.S. 968.

to be a "just and reasonable" rate within the meaning of Section 4 of the Natural Gas Act. This would constitute the only proper measurement of unjust enrichment, if any. But, as is shown in the preceding paragraph, the Commission—the only agency empowered to make such a determination—has never found that the June 7, 1954 rate was a "just and reasonable" rate or that the prices collected by Ohio were not "just and reasonable."

In view of the foregoing, it is seen that the court below, in purporting to allow restitution for the full amount between the prices collected by Ohio during the stay and the price in effect on June 7, 1954, has in effect made a determination that the June 7, 1954, rate was a "just and reasonable" rate,[17] and that the contract rate after June 7, 1954 was unjust and unreasonable to the extent of each contract increase. In this respect, therefore, the decision of the court below invades the province of administrative action. This is an error which should be corrected by this Court.

V

OTHER ERRORS IN THE DECISION BELOW

1. *The Defense of Limitations.* The lower court's decision is predicated on a fatal inconsistency. It approves a judgment against Ohio on the ground that Ohio's contract price increases, collected without making filings with the Commission, were illegal and unlawful, but, at the same time, it attempts to avoid

[17] This follows from the Courts' statements that the June 7, 1954 rate was the only "lawful" rate (299 F.2d at 694, App. A, *infra*, p. 4a; 201 F. Supp. at 678, App. A, *infra*, p. 17a), since under the Act, the only lawful rate is a "just and reasonable" rate. See p. 17, *supra*.

Ohio's defense of limitations by holding that the cause of action to recover the price increases did not arise until the termination of the court stay. If, however, the price increases were unlawful because they were collected in violation of Section 4 of the Act, and the stay did not affect the statutory requirement (as the Court holds), the increases were unlawful *when collected,* with the result that the claim for all collections made prior to January, 1957, is barred by the Texas two-year statute of limitations (Vernon's Civil Statutes of Texas, Article 5526), which applies to actions for restitution and "money had and received." *Rose* v. *State Bank,* 122 Texas 293, 308, 59 S.W. 810, 811 (1933); *Causeway Inv. Co.* v. *Nass,* 131 Texas 12, 16, 111 S.W. 2d 703, 705 (1938). On the other hand, if the collection of the price increases was not unlawful, as Ohio contends, there can be no basis for a recovery on the merits.

One thing is certain. Ohio's collection of its price increases was either lawful or unlawful. It could not be both. This is a fatal defect in the decision of the court below.

2. *The Allowance of Interest.* Despite its holding that the cause of action arose at the termination of the stay on February 1, 1957, the court below approved an award of interest from the date of each monthly collection made by Ohio in the years 1955 and 1956. This is clearly erroneous. In restitution cases, even where recovery is warranted, there can be no basis for an award of interest for any period prior to the date upon which a duty of restitution arose.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1962

APPENDIX A

Opinion of the Court of Appeals

SOCONY MOBIL OIL COMPANY, INC., *Appellant*,

v.

BROOKLYN UNION GAS COMPANY, *et al.*, *Appellees*.

THE OHIO OIL COMPANY, *Appellant*,

v.

BROOKLYN UNION GAS COMPANY, *et al.*, *Appellees*.

BROOKLYN UNION GAS COMPANY, *et al.*, *Appellants*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *et al.*, *Appellees*.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *Appellant*,

v.

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC., *Appellees*.

Nos. 18941-18944.

United States Court of Appeals
Fifth Circuit.

Feb. 14, 1962.

Thomas Fletcher, John Daniel, Vinson, Elkins, Weems & Searls, Houston, Tex., for Socony Mobil Oil Co., Inc.

Richard L. McGraw, Austin C. Wilson, W. H. Davidson, Jr., Houston, Tex., Fulbright, Crooker, Freeman, Bates & Jaworski, Houston, Tex., of counsel, for Transcontinental Gas Corp.

F. L. Andrews, W. M. Streetman, Lewis T. Sweet, Jr., Houston, Tex., Andrews, Kurth, Campbell & Jones, Houston, Tex., of counsel, for Brooklyn Union Gas Co., et al.

Warren B. Leach, Jr., W. Hume Everett, J. O. Terrell Couch, Houston, Tex., Clayton L. Orn, Robert M. Vaughan, Findlay, Ohio, for Ohio Oil Co.

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge.

These appeals from summary judgment of the United States District Court for the Southern District of Texas present many interesting questions of law. The district judge, in a memorandum opinion,[1] set forth these questions clearly and delat with them in a thorough and completely correct way. It would serve no useful purpose, therefore, for us to set the questions out or discuss them in detail here. It is sufficient to say that it is our view that the judgments should be affirmed throughout upon the opinion of the district judge.

Summed up, the appeals present on the side of the appellants, Socony Mobil Oil Company, Inc., Et Al, the primary contentions: (1) that because of a stay order entered by this court in Magnolia Petroleum Co. v. Federal Power Commission, 236 F.2d 785, in an appeal from Order No. 174-A of the Federal Power Commission, the rates collected by the appellants were legal and proper, and when the appeal was decided against the appellants by a dismissal and the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required as to them; and (2) that the proof failed to make out a case for restitution.

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[1] Brooklyn Union Gas Company et al. v. Transcontinental Gas Pipe Line Corp. et al., (6-29-60) 201 F.Supp. 673.

As the opinion of the district judge points out, this view proceeds from a misapprehension of the nature and effect of the stay order and of the state of the applicable law. As he also points out, this court dismissed the appeal in which the stay order was entered on the ground that Order No. 174-A, which was attacked by the appellants in that case, was not an appealable order, and this court did not, either in the order dismissing the appeal or in any other order entered by it, undertake to in any way validate the rates collected by the appellants. As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained.

Here the evidence is undisputed that the proposed rates collected by the appellant, the recovery back of which was ordered by the district judge, were not filed with the Commission until long after they were collected, and equally undisputed that this court did not authorize, or attempt to authorize, the collection of any particular rate. It merely provided a stay of Commission action during the pendency of the appeal, and when the appeal was dismissed by this court and review was later denied by the Supreme Court, the stay order expired and lapsed, and the parties to the collection and payment of the rates in question were then remitted to the statutory law to determine their rights on the issue of restitution.

In addition to the attack on the judgments as unwarranted because the rates collected by them had been col-

lected under a valid contract, appellants attack the judgments as erroneous because the claims against them were barred by limitation.

The district judge dealt carefully with this claim and we think correctly denied it. As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations. Its action was solely ancillary to determining, the effect of the stay orders and their dissolution, and of the failure of appellants to file their proposed changes of rates as required by statute and the regulations of the Commission. The rate settlement between plaintiffs and Transcontinental does not preclude such a determina ion on grounds of estoppel because the refund cl se of the agreement between Transcontinental and Brooklyn plainly declared that there might be refunds and that if there were, they would belong to the consumer plaintiffs.

Plaintiffs were entitled to recover on the merits because the only lawful rates from June 7, 1954, until appellant received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act, 15 U.S.C.A. § 717c and Order 174-A, the contract rates in effect on June 7, 1954, the date of the Phillips decision (Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035), were the only lawful rates which could be collected until changed by filing the proposed changes with the Federal Power Commission as required by statute. Any rate changes provided for in the contract, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the National Gas Act and are forbidden in the absence of compliance with the

filing provisions of the Act and the regulations of the Commission.[2]

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio et al did no more than prevent the Commission from interfering with the collection by Mobil and Ohio et al of rates above the June 7, 1954 level. When these stay orders were dissolved, and Mobil and Ohio et al filed their contracts with the Commission and the filings were accepted at the June 7, 1954, level, a duty of restitution arose, requiring Mobil and Ohio et al to restore to Transcontinental and/or plaintiffs amounts collected during the pendency of the stays in excess of the June 7th rate.[3]

The stay orders cannot be construed as protecting Mobil and Ohio et al in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et al action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332, at 347, 76 S.Ct. 373, 100 L.Ed. 373. The stay orders neither by their terms nor by implication provided, nor could they have provided, that the statute and the regula-

[2] Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 246 F.2d 915; Bel Oil Corp. v. Federal Power Commission, 5 Cir., 255 F.2d 548; Mississippi Power & Light Co. v. Memphis Natural Gas Co., 5 Cir., 162 F.2d 388.

[3] Natural Gas Pipeline Co. v. Harrington, 5 Cir., 246 F.2d 915; Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517.

tions of the Commission, legislative in nature as they were, would not have to be complied with in order to effect a change in the rates, and nothing in the stay orders stated or implied that Mobil and Ohio et al could retain monies collected during the pendency of the stay orders on rates put into effect without complying with the statute and regulations.

A stay order does not adjudicate rights. It merely preserves the status quo. The status quo here was that until the proposed changes in rates by escalation or otherwise, were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored. At the time the stay orders were issued, the lawful rates established by virtue of the Act and the regulations of the Commission, were the contract rates of June 7, 1954. The stay orders did not deal with, or attempt to change, this situation at all. This court did not, indeed could not, authorize an increase in the lawful rates. Such authority could be granted only by a compliance with the statute and regulations promulgated under its authority. The stay orders could not have had any effect on the statutory scheme. We think the court can not do better than to adopt the opinion of the district judge and affirm his judgments on the basis of it.

Another question raised in the case by the defendants-appellees arises out of the fact that, while the contract was made by the appellants with the Transcontinental Gas Pipe Line Corporation, the suit was brought by and for the benefit of Transcontinental's customers with Transcontinental intervening. Appellant-defendants, therefore, insist that there is no privity of contract between them and these customers and that there is no right of action in the customers to recover from them.

We think the district judge was right in respect of these contentions under the record in this case, which contains a notation in an order of the Commission in connection with the settlement made by Transcontinental with the plain-

tiffs, that any recoveries back which Transcontinental might be entitled to should be for the benefit of its customers. On the pleadings and the undisputed facts in this case, plaintiffs were real parties in interest and entitled to judgment as such.

In addition to these questions, there is a question which is brought up on the appeal of plaintiffs in the suits. This question is whether the judgment was wrong in not allowing interest on interest. These appellants insist that the judgment, which was for the amount of the unlawful rates collected without interest up to but not after the date of the judgment, was erroneous, and that judgment should have been for the amounts collected with interest to the judgment date, and this entire amount should have then borne interest from the date of the judgment.

The district judge was of the opinion that to allow a judgment such as this would be to allow compound interest and that the prevailing Texas rule, as stated in McDaniel v. Miller, Tex.Civ.App., 317 S.W.2d 546, prevents this. The appellants, while conceding that the state of the law in Texas is confusing on this matter, argue that the McDaniel case is not controlling authority in Texas; that for its particular facts, the case was properly decided, but that Frazier v. Campbell, 5 Tex. 275 and Miner v. Parish Exchange Bank, 53 Tex. 559, decided the contrary.

While it is true that there is considerable confusion in the Texas decisions, we are inclined to follow Judge Ingraham's view[1] that the McDaniel case is authoritative here, and we are, therefore, of the opinion that the judgment should be affirmed on the plaintiffs' appeals as well as on the defendants' appeals.

We think the case was well tried throughout and, no substantial error appearing, the judgments are

Affirmed.

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[1] Brooklyn Union Gas Company et al. v. Transcontinental Gas Pipe Line Corporation et al., D.C. (11-23-60) 201 F.Supp. 679.

First Memorandum Opinion of the District Court
(Issued June 29, 1960)

BROOKLYN UNION GAS COMPANY, Consolidated Edison of New York, Inc., Elizabethtown Consolidated Gas Company, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric & Gas Company, South Jersey Gas Company, Piedmont Natural Gas Co., the United Gas Improvement Company, Public Service Co. of North Carolina, Inc., Delaware Power & Light Co., *Plaintiffs,*

v.

TRANSCONTINENTAL GAS PIPE-LINE CORPORATION, Socony Mobil Oil Company, Inc., the Ohio Oil Company, *Defendants.*

Civ. A. Nos. 12474, 12482.

United States District Court
S. D. Texas,
Houston Division.

June 29, 1960.

Andrews, Kurth, Campbell & Jones, W. M. Streetman, F. L. Andrews, Alfred H. Ebert, Jr., and Lewis T. Sweet, Jr., Houston, Tex., for plaintiffs.

Fulbright, Crooker, Freeman, Bates & Jaworski, Austin C. Wilson and Richard L. McGraw, Houston, Tex., for defendant Transcontinental Gas Pipe Line Corp.

Vinson, Elkins, Weems & Searles, Thomas Fletcher, J. D. McDaniel and J. W. McCartney, Houston, Tex., for defendant Socony Mobil Oil Co., Inc.

Clayton L. Orn and Robert M. Vaughan, Findlay, Ohio, James D. Parriott, Washington, D. C., Warren B. Leach, Jr., J. O. Terrell Couch and W. Hume Everett, Houston, Tex., for defendant Ohio Oil Co.

INGRAHAM, District Judge.

These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermillion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a "favored nations" clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, commingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m. c. f., while Ohio's contract price on said date was 8.730376 cents per m. c. f.

On June 7, 1954, the Supreme Court of the United States held in Phillips Petroleum Co. v. State of Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, that Phillips, a natural gas producer and gatherer, was a "natural gas company" within the meaning of that term as defined in the Natural Gas Act, 15 U.S.C.A. § 717 et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, and selling natural gas in interstate commerce. The Phillips decision is applicable to both of them.

Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954 rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certification of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. Magnolia Petroleum Company et al v. Federal Power Commission, 5 Cir., 1956, 236 F.2d 785.

Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commission as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

> "In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or

under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Transco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco * * *."

Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers. On January 10, 1959, all plaintiffs, except Delaware Power & Light Company, instituted Civil Action No. 12,474 in this court against Transco, Mobil, and Ohio. On January 12, 1959, Delaware Power & Light Company filed a similar action in the District Court of Harris County, Texas, 127th Judicial District, under Docket No. 520,558, which cause was thereafter removed to this court by Transco as Civil Action No. 12,482 and was later consolidated with C.A. No. 12,474. In C.A. 12,474 plaintiffs seek a total recovery in the amount of $912,414.72, plus interest, and separately claim from Mobil and Ohio the sums of $494,626.64 and $417,788.08, respectively. In C.A. 12,482 the total amount sought is $25,378.60, plus interest, while the separate claims against Mobil and Ohio are $13,757.92 and $11,620.68, respectively.

The basis of plaintiffs' action against Mobil and Ohio is that the contract rates in effect between Transco and Mobil and Ohio on June 7, 1954, were the only lawful rates which could be charged for gas delivered by Mobil and Ohio to Transco during the period from February 1, 1955, through January 31, 1957. During this period the charges in excess of the alleged lawful rate were passed on to plaintiffs and other customers of Transco. As the real parties in interest, plaintiffs now seek restitution of what they consider to be their just portion of the excess charges

Asserting Transco's claims against Mobil and Ohio, they maintain that Transco has effectively assigned to plaintiffs said claims in its answer, counter-claim, and cross-claim.

Against Transco plaintiffs claim any monies that it may recover from Mobil and Ohio, since the agreements and order provide for such a refund in the event any of the suppliers of Transco, whose rates were being charged under court stay orders, were required to make refunds to Transco. They contend, however, that Transco is liable to them regardless of whether it has collected from Mobil and Ohio and even though it might not have collected had it vigorously pursued its remedies. They rest Transco's said liabilitity upon an implied obligation arising under the refund provision of the settlement agreements and order to exercise reasonable diligence to secure the refunds due Transco, including the timely filing and good faith prosecution of suit, if necessary, against Mobil and Ohio. They maintain that Transco has not fulfilled this obligation by merely filing a cross-action for declaratory relief in the present action and failing to pursue vigorously its rights against Mobil and Ohio in plaintiffs' behalf.

Mobil contends that neither plaintiffs nor Transco can recover any monies from it, since the court does not possess the legislative power of rate-making and cannot fix or determine what were the just and reasonable rates for Mobil's gas sold to Transco and cannot award reparations. It claims that the Federal Power Commission approved rates in Transco's rate proceeding designed to recover Transco's cost of service, including recoupment of charges paid Mobil by Transco, on representations that such costs, expenses, and rates which would recoup them were proper, just, and lawful as the Natural Gas Act requires. Whereby Mobil argues that plaintiffs and Transco have no right of recovery and ought to be estopped from asserting that such costs and expenses are unlawful, unjust, and unreason-

able. It maintains that the Fifth Circuit's stay order fully protected Mobil from any refund. It cites various reasons why recovery by plaintiffs would be inequitable and asserts that Transco cannot recover upon its counterclaim and cross-claim for declaratory judgment.

Ohio contends that the Fifth Circuit's stay order granted it full immunity from the requirements of Order No. 174-A and of Section 4 of the Natural Gas Act and that there can be no recovery because the court of appeals did not condition the stay on the giving of any bond or any agreement to refund. It argues that the court is not authorized to award reparations. It would show that plaintiffs' claim, if any ever existed, is now barred by limitations, citing Article 5526, Revised Civil Statutes of Texas, which applies to debts where the indebtedness is not evidence by a contract in writing. Ohio then sets forth the equitable considerations supporting judgment in its favor and against judgment for plaintiffs.

Transco contends that the real controversey is between plaintiffs and Mobil and Ohio and that is only obligation, in the nature of a stakeholder's or interpleader's, is to pay over and account to plaintiffs for any monies that plaintiffs may recover from Mobil and Ohio and that the court may direct be paid to Transco by Mobil and Ohio for distribution to plaintiffs. It maintains that plaintiffs have failed to state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

The court believes that the following action should be taken on the motions for summary judgment. Plaintiffs' first motion for summary judgment against Mobil and Ohio should be granted, while their second motion against Transco should be denied. Transco's first and second motions for summary judgment should be granted. The motions for summary judgment of Mobil and Ohio should be denied.

This case can be decided on motions for summary judgment in favor of plaintiffs and Transco, since there is no genuine issue as to any material fact and since said moving parties are entitled to judgments as a matter of law. Mobil and Ohio contend that there are genuine issues of material fact, namely, whether any of the gas sold to Transco was resold to plaintiffs and, if so, what portion reached each plaintiff and what amounts of money, if any, may be recovered by each plaintiff from Mobil and Ohio. Those alleged issues are irrelevant because plaintiffs are asserting Transco's cause of action. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the amounts charged therefor. The higher rates charged by Mobil and Ohio resulted in greater charges to plaintiffs by Transco. What distribution of overpayments to Mobil and Ohio is made to Transco's customers is a matter between Transco and its customers. It is no ground upon which Mobil and Ohio can avoid repayment, if they are protected from further payment or a multiplicity of suits.

The amounts that plaintiffs seek to recover against Mobil and Ohio are shown in Exhibit "E" attached to plaintiffs' original complaints, which amounts are certified by the affidavit of J. T. Duncan, Assistant to the Financial Vice-President of Transco. All of the plaintiffs are utility customers of Transco; each was a party to the settlement agreements with Transco which were approved by the Federal Power Commission. The amounts alleged to be due to each plaintiff, as set forth in Exhibit "E", were computed in accordance with the formula stated by the Federal Power Commission in its order approving the rate settlement with Transco.

Plaintiffs are the assignees of Transco's cause of action and are the real parties in interest. Transco effectively assigned its claims against Mobil and Ohio to plaintiffs by its pleadings. See Transco's answer, counter-claim, and cross-claim, p. 8, par. (e); p. 15, par. 33; and p. 22, par. 19.

All the parties to the assignment are before the court. So long as Mobil and Ohio can satisfy their obligation to Transco by paying plaintiffs, which Transco freely states, any defense to the assignments which could be asserted by Transco in a suit by plaintiffs against Transco is of no consequence to Mobil and Ohio.

Plaintiffs' claims are not barred by limitations, since neither the two-year period of Article 5526 nor the four-year period of Article 5527, Vernon's Texas Civil Statutes, would bar recovery. Article 5526 applies to actions for debt where the indebtedness is not evidenced by a contract in writing. Covering many actions for "money had and received", Ohio contends that said statute applies to the case at bar. Article 5527 refers to actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. Plaintiffs contend that the latter statute governs the case at bar. The controlling question, however, is the date upon which the cause of action arose. It is evident that the cause of action did not arise until the day when the stay orders were dissolved, namely, February 1, 1957. The excess rates were lawfully collected during the pendency of the stay orders. Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 1957, 246 F. 2d 915. Since these actions were filed on January 10 and 12, 1959, it is apparent that they are not barred by either the two-year or the four-year statute of limitations; nor can plaintiffs' claims be considered barred by laches, since no extraordinary circumstances exist whereby said claims should be barred before the period of limitations has run. Culver v. Pickens, 1943, 142 Tex. 87, 176 S.W. 2d 167.

The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission, the court is not

fixing any just or reasonable rate or granting reparations. Its action is solely ancillary to determining the effect of the stay orders and their dissolution. The rate settlement between plaintiffs and Transco does not preclude such a determination on grounds of estoppel because its refund clause plainly contemplated that there might be refunds that would be passed along to plaintiffs.

Plaintiffs are entitled to recovery on the merits because the only lawful rates from June 7, 1954, until Mobil and Ohio received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission. This is true even though the contract rate was unfiled. Any rate changes provided for in the contract, filed or unfiled, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act. Natural Gas Pipeline Co. of America v. Harrington, supra; Bel Oil Corporation v. Federal Power Commission, 5 Cir., 1958, 255 F.2d 548; Mississippi Power & Light Co. v. Memphis Natural Gas Company, 5 Cir., 1947, 162 F.2d 388; Cities Service Gas Producing Co. v. Federal Power Commission, 10 Cir., 1956, 233 F.2d 726; Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 1956, 231 F.2d 461; Phillips Petroleum Co. v. Federal Power Commission, 10 Cir., 1958, 258 F.2d 906; Episcopal Theological Seminary v. Federal Power Commission, D.C., 1959, 269 F.2d 228.

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio temporarily allowed them to increase their prices above the June 7, 1954, level without approval by the Federal Power Commission. When those stay orders were dissolved and Mobil and Ohio

filed their contracts with the Commission, the filings were accepted at the June 7, 1954, level. A duty of restitution arose, requiring Mobil and Ohio to restore to Transco amounts collected during the pendency of the stays in excess of the June 7 rate. Natural Gas Pipeline Co. of America v. Harrington, supra; Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., 8 Cir., 1935, 80 F.2d 32.

The stay orders cannot be construed as protecting Mobil and Ohio in the receipt of overcharges for two reasons: (1) courts do not have the authority to establish rates and construing the stay orders as approval of the increased rates imputes to the court an attempt to do indirectly what it cannot do directly and (2) although the stay orders, until dissolved, relieved Mobil and Ohio of the necessity, for the time being, of filing in accordance with Order No. 174-A, the stay orders neither by their terms nor by implication provided that Mobil and Ohio could retain monies collected during the pendency of the stay orders nor did the orders relieve them from the consequences of their failure to comply with Order 174-A. A stay order does not adjudicate rights but merely preserves the status quo. Scripps-Howard Radio, Inc. v. Federal Communications Commission, 1942, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229.

At the time the stay orders were issued, the lawful rates had been established as the contract rates of June 7, 1954. Natural Gas Pipeline Co. v. Harrington, supra. Since the Fifth Circuit could not authorize an increase in the lawful rate, the stay order could not have had that effect, and the court could have intended nothing more than to permit Mobil and Ohio to collect the higher rates until the final determination of that case. In the Berthold-Jennings and Arkadelphia cases the railroads obtained injunctions against the state's railroad commission's enforcement of the established maximum freight rates, which injunctions

permitted the railroads to collect higher rates. After the dissolution of the injunctions, the railroads were required to repay the overcharges they had collected on the theory of restitution. The fact that no bond had been required of the railroads after the granting of the permanent injunction did not alter the result.

In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them.

Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

Plaintiffs first motion for summary judgment against Mobil and Ohio will be granted. Their second motion for summary judgment against Transco will be denied. Transco's first and second motions for summary judgment will be granted. The motions for summary judgment of Mobil and Ohio will be denied.

Second Memorandum Opinion of the District Court
(Issued November 23, 1960)

BROOKLYN UNION GAS COMPANY, Consolidated Edison of New York, Inc., Elizabethtown Consolidated Gas Company, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric & Gas Company, South Jersey Gas Company, Piedmont Natural Gas Co., the United Gas Improvement Company, Public Service Co. of North Carolina, Inc., Delaware Power & Light Co., *Plaintiffs*,

v.

TRANSCONTINENTAL GAS PIPELINE CORPORATION, Socony Mobil Oil Company, Inc., the Ohio Oil Company; *Defendants.*

Civ. A. Nos. 12474, 12482.

United States District Court

S. D. Texas.

Houston Division.

Nov. 23, 1960.

Andrews, Kurth, Campbell & Jones, W. M. Streetman, F. L. Andrews, Alfred H. Ebert, Jr. and Lewis T. Sweet, Jr., Houston, Tex., for plaintiffs.

Fulbright, Crooker, Freeman, Bates & Jaworski, Austin C. Wilson and Richard L. McGraw, Houston, Tex., for defendant Transcontinental Gas Pipe Line Corp.

Vinson, Elkins, Weems & Searles, Thomas Fletcher, J. D. McDaniel and J. W. McCartney, Houston, Tex., for defendant Socony Mobil Oil Co., Inc.

Clayton L. Orn and Robert M. Vaughan, Findlay, Ohio, James D. Parriott, Washington, D. C., Warren B. Leach, Jr., J. O. Terrell Couch and W. Hume Everett, Houston, Tex., for defendant Ohio Oil Co.

INGRAHAM, District Judge.

In opinion filed June 29, 1960, 201 F. Supp. 673, plaintiffs, distributors of natural gas, were given restitution of monies paid by Transcontinental Gas Pipe Line Corporation (Transco) to its codefendants, Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio), through increases in price for natural gas sold and delivered to Transco. Defendant and cross-plaintiff Transco's fourth motion for summary judgment and alternative motion for severance is before the court. This motion deals with Transco's right to recover from Mobil and Ohio, for the use and benefit of its customers other than plaintiffs, the sum of $56,120.41, together with interest thereon. This amount represents the difference between the sum of $937,793.32 which plaintiffs will recover from Mobil and Ohio under the rulings of this court and the total of $993,913.73 paid by Transco to Mobil and Ohio from February 1, 1955, to February 1, 1957, in excess of contract prices in effect on June 7, 1954. Names of these customers (other than plaintiffs) and amounts payable to each are found in the affidavit attached to this fourth motion.

Transco's alternative motion for severance will be denied. The subject matter of the so-called fourth motion has already been submitted to the court. This motion should be disposed of and not tried piecemeal. The claims asserted by plaintiffs and the claim sought to be asserted by Transco on behalf of its other utility customers arise out of the same factual circumstances. Should Mobil and Ohio appeal, the whole matter should be taken up. Fed. Rules Civ. Proc. 54(b), 28 U.S.C.A., will not be used here.

Mobil's and Ohio's answers to the fourth motion of Transco urge two grounds for denial: (1) lack of jurisdiction in that no diversity, requisite amounts, or federal questions are shown; and (2) unresolved factual issues bar summary judgment. The court is however of the opinion that jurisdiction is present and that no factual issues re-

majn. Transco's fourth motion for summary judgment will be granted. These two supposed impediments will be disposed of separately.

Much is said at page two of Mobil's answer about lack of diversity and amounts involved. Mobil's briefs in support of its motion for summary judgment make the same argument. This court necessarily rejected these contentions by overruling Mobil's motions for summary judgment in their entirety. Further, Transco's motion is a cross-claim within Fed. Rules Civ. Proc. 13(g). As such it is ancillary to the related, principal claim. No independent jurisdictional basis need be laid for a cross-claim. 3 Moore's Federal Practice, Sec. 13.36 (2r Ed. 1948). Our circuit court so held in Childress v. Cook, 245 F.2d 798, 802-805 (5th Cir. 1957).

Mobil and Ohio argue that certain factual issues are yet unsettled. These are said to prevent summary judgment. These issues summarized are what amounts, if any, of the gas sold to Transco was resold to these customers of Transco, not named as plaintiffs, and what amounts of money, if any, may be recovered by each customer from Mobil and Ohio. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the charges therefor. These issues are irrelevant for the reasons suggested in the opinion of June 29, 1960, D.C., 201 F.Supp. 673. They are disposed of at page 677 thereof. The court remains of the view announced at page 677 of the June opinion, "* * * there is no genuine issue as to any material fact * * *"

It is necessarily follows from my rejection of severance of Transco's fourth motion that the form of judgment tendered by plaintiffs will not suffice. That form does not reflect this disposition of the fourth motion. The final judgment to be entered herein must include today's granting of Transco's motion. Mobil and Ohio level other

criticisms at plaintiffs' proposed judgment. These will now be considered.

Plaintiffs have tendered a form of judgment which would permit recovery from Mobil of $643,363.30 and from Ohio the sum of $544,744.86. The figures recoverable as the excess over the rates of June 7, 1954, were respectively $508,384.56 and $429,408.76. Thus, plaintiffs have tendered a judgment which will permit them recovery of $250,314.84 in excess of the principal amount allowed by the opinion of June 29, 1960. This difference constitutes interest for the withholding of such sums from the dates on which such sums were received from the Transco by Mobil and Ohio. At page three of plaintiffs' motions for summary judgment such interest was requested. This court so noted at page seven of the June opinion. Mobil and Ohio state that this opinion did not allow such interest, and hence plaintiffs' proposed judgment is excessive by this interest amount. In any event Mobil and Ohio strenuously object to allowance of interest on the principal. Briefs have been submitted which purport to show the impropriety of interest on a restitutory award.

While the matter received no explicit treatment in the opinion of June 29, 1960, an award of interest may be implied from the granting of plaintiffs' first motion for summary judgment against Mobil and Ohio at page eleven therein. That motion included a request for interest. The issue deserves a fuller treatment. I conclude that such interest should be allowed. The governing principle is well stated in Restatement, Restitution, Sec. 156 (1937):

> "* * * A person who who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if: * * * (b) the value of the benefit can be ascertained by mathematical calculation *from the terms of an agreement* between the parties or by established market prices * * *."

The comment to this section at page 620 notes the obligation to pay interest from the time when the money should have been paid. Our court of appeals cited the Restatement in an analogous case to support a similar award of interest. Natural Gas Pipeline Co. of America v. Harrington, 246 F.2d 915, 921 (5th Cir. 1957). This case is determinative of plaintiffs' right to recover interest on the excess payments, at least from February 1, 1957, the date of dissolution of the stay order. Natural Gas paid an increased price pursuant to an Oklahoma minimum price order. That order was invalidated by the United States Supreme Court; Natural Gas sued for recovery of excess payments. The court of appeals held that interest should accrue from the date the minimum price order was invalidated.

Okeechobee County, Fla. v. Nuveen, 145 F.2d 684, 687 (5th Cir. 1944), indicates the district courts are vested with considerable discretion in the awarding of interest damages upon restitutory sums. Considerations of fairness and traditional equitable principles are to guide the exercise of this discretion. Allowances of interest seems best to accord with these guide-lines in this instance. The cases cited by Mobil and Ohio have been considered. They too stress this discretionary role. This interest is allowed as a means of compensating plaintiffs' loss of use of their monies.

Additional interest difficulties remain. Plaintiffs and defendants are not in accord on the period for commencement of this interest. Plaintiffs say interest should run from the date the respective monthly payments were made by Transco to Mobil and Ohio. They have so computed interest in their form of judgment. Mobil and Ohio argue that such starting points are not consonant with the court's memorandum in June. They conclude from that opinion, especially page 676, that they were entitled to collect, during the stay period, the contractual increases. Under the

court's rationale, they declare, there could be no duty of restitution during that period. They cite page 678 of the opinion as indicating the cause of action in restitution arose on February 1, 1957. Necessarily, the court is told, no interest can be claimed before that date, for no duty of restitution existed prior thereto.

Defendants' argument has considerable logical appeal. Yet, Mobil and Ohio have had the use of this money from the date of its receipt. Similarly, plaintiffs have been deprived of the use of such funds from the time these increased rates were reflected in Transco's charges to them. Equitable considerations compel the conclusion that interest should commence from the respective dates of Transco's overpayments to the defendants. Plaintiffs' motion for judgment so provides. Mississippi River Fuel Corp. v. Federal Power Commission, 281 F.2d 919 (D.C. Cir. 1960), supports this conclusion. The ruling of the Federal Power Commission in a similar interest question is therein approved. The Commission ordered "* * * interest at the rate of 6 per cent per annum from the date of receipt of such excess amounts to the date of refund." 21 F.P.C. 48, 53. Language in Natural Gas Pipeline Company of America v. Harrington, supra, buttresses this result. The factual situation of this case has been referred to, supra. The court of appeals granted interest from the date the minimum price order was held invalid. Interest before that date was declined because the recipient of increased prices had not received them due to its fault or volition. Here, however, as noted at page eighteen of my prior opinion, Mobil and Ohio actively sought and obtained the stay order. The excess charges were not of the windfall variety present in Harrington. They came to Mobil and Ohio due to their own volition. They should pay interest on the funds withheld from the time of their receipt, not just from February 1, 1957.

There remains one other question with regard to interest. Plaintiffs have accrued interest prior to the rendition

of the judgment and included such interest in the principal sum as interest damages. Then they provide in their tendered judgment that the amounts set forth in the judgment shall bear interest at the rate of 6% per annum. Defendants claim plaintiffs have thus figured the interest contrary to the rule that compound interest is not allowed in the absence of a contract providing therefor. Cherokee Nation v. United States, 270 U.S. 476, 46 S.Ct. 428, 70 L.Ed. 694 (1926), is said to be contrary. The Texas rule allegedly prevents this. McDaniel v. Miller, 317 S.W.2d 546, 549 (Tex. Civ. App. 1958), is cited. The court therein held it to be improper to include interest as a part of the principal sum of the judgment and then allow the judgment to draw interest at the rate of 6% per annum. Plaintiffs' answer to Ohio's reply to its motion for judgment at pages six and seven admits McDaniel is contrary to their view. They cite earlier cases from Texas as presenting a different view; McDaniel is "wrong", plaintiffs declare. It is clear that this is a matter to be determined by state law. T. & M. Transport Co. v. S. W. Shattuck Chemical Co., 158 F.2d 909 (10th Cir., 1947); Herd & Co. v. Krawill Machinery Corp., 256 F.2d 946 (4th Cir. 1958) aff'd 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959).

The Texas cases are rather confusing on this matter. On the one hand, as indicated supra, McDaniel denies interest on that portion of the judgment which constitutes interest on the principal. Plaintiffs cite five earlier cases which they say are contray to McDaniel. None of these five are cited in McDaniel; indeed, the Texas Court of Civil Appeals cited no authority for its holding therein. Frazier v. Campbell, 5 Tex. 275 (1849), is said by plaintiffs to first establish the law in Texas on this issue. It is true that the Supreme Court of Texas allowed interest on a judgment containing interest; the case, however, may be distinguishable in that the instrument sued upon specified what interest the principal was to bear. In this case the interest granted herein on the principal was not consensual in

origin but judicially allowed. Miner v. Paris Exchange Bank, 53 Tex. 559 (1880), alludes to Frazier, supra, but it is inapposite, for its concerns usury, not interest on the judgments. The remaining cases cited by plaintiffs allowed interest on that portion of the judgment which constituted interest. On first reading they seem to conflict with McDaniel. All however involve consensual or contractual interest on a principal. Like Frazier, they concern instruments carrying in their provisions interest. McDaniel is more analogous to the present situation, for it dealt with a judgment for judicially-imposed interest. McDanie must guide my decision. Hence, interest will be granted only on that portion of the judgment which constitues principal and not interest.

Mobil and Ohio have further objections to the tendered form of judgment. The first paragraph following the figures on page three of the proposed judgment grants judgment against plaintiffs and in favor of Transco on plaintiffs' suit against Transco, but awards court costs thereon to Transco against Mobil and Ohio. As to that such costs should be taxed against plaintiffs. Mobil properly objects to being taxed for plaintiffs' failure in that respect.

Said judgment as drawn constitutes a taxation of costs jointly against Mobil and Ohio. The causes of action against the two were different. The only common fact was that both sold gas to Transco. No basis appears for joint taxation of costs against Mobil and Ohio. Hence, costs will be taxed separately against Ohio and Mobil. The costs of the fourth motion of Transco will be taxed separately against Ohio and Mobil.

A notice of appeal was included in the form of judgment. Mobil and Ohio object thereto, preferring to give their own. The notice of appeal will be deleted from the proposed judgment.

I now summarize the conclusions arrived at herein. Transco's alternative motion for severance will be denied, while its fourth motion for summary judgment will be granted. Interest on the principal sum involved in said fourth motion may accrue from the time of the respective overpayments by Transco to Mobil and Ohio. The form of judgment next tendered must reflect this disposition of the fourth motion. Plaintiffs' proposed form of judgment properly contains interest on the principal computed from a series of beginning dates arising prior to February 1, 1957. Interest on the judgment itself may be computed only on that portion of the judgment which constitutes principal. For example, plaintiffs' interest figure of $250,314.84 may not itself bear interest. Costs will be taxed separately against Mobil and Ohio. Plaintiffs will bear the costs of their failure to obtain judgment against Transco. No notice of appeal will be included.

The clerk will notify counsel to draft and submit appropriate judgment.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18942

D. C. Docket Nos. 12474 and 12482 Civil

THE OHIO OIL COMPANY, *Appellant*,

versus

BROOKLYN UNION GAS COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court
for the Southern District of Texas.

Before Tuttle, Chief Judge, and Hutcheson and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Feb. 14, 1962

Order Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY, INC., *Appellant*,

v.

BROOKLYN UNION GAS COMPANY, ET AL., *Appellees*.

No. 18942

THE OHIO OIL COMPANY, *Appellant*,

v.

BROOKLYN UNION GAS COMPANY, ET AL. *Appellees*.

No. 18943

BROOKLYN UNION GAS COMPANY, ET AL., *Appellants*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL., *Appellees*.

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *Appellant*,

v.

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC., *Appellee*.

Appeals from the United States District Court for the Southern District of Texas

(May 21, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, *Chief Judge*, and HUTCHESON and JONES, Circuit Judges. PER CURIAM:

It is ORDERED that the petitions for rehearing in the above entitled and numbered causes be and they are hereby DENIED.

APPENDIX B

Section 4 of the Natural Gas Act of June 21, 1938, 52 Stat. 821, 822, as amended, 15 U.S.C. 717c:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regu-

lations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or

charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938), 15 U. S. C. § 717c, as amended by Public Law 87-454, approved May 21, 1962, 76 Stat. 72]

Excerpt From
Federal Power Commission Order No. 174-A (Superseding Order No. 174), Issued August 6, 1954 (19 F.R. 5081)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-138

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper and Seaborn L. Digby.

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements

ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS.

By order No. 174 issued July 16, 1954 (19 F. R. 4534), the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in Phillips Petroleum Company v. Wisconsin et al., 347 U. S. 672.

Upon further consideration of the matter, the Commission finds:

(1) Sections 157.23, 157.24, and 157.25 of the regulations under the Natural Gas Act prescribed by Order No. 174

should be revised, as hereinafter provided, so as to allow those proposing to engage in the transportation or sale of natural gas in interstate commerce as independent producers to use one of the simpler forms of application therein provided and to clarify some of the requirements of those forms, and to clarify § 154.94. Section 154.102 *Posting*, should be eliminated and § 154.103 *Applicability*, should be renumbered as § 154.102.

(2) The other sections in Parts 154 and 157 of the regulations under the Natural Gas Act prescribed by Order No. 174 which are not being revised or eliminated should be readopted and as so readopted, together with the revised §§ 157.23, 157.24 and 157.25, are necessary and appropriate to carry out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly sections 4, 7, and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f and 717o), and subject to the provisions of sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), orders:

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 "Independent producer" defined. An "independent producer" as that term is used in §§ 154.91 to 154.102 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 Filing of rate schedules by producer-gatherer "Natural-Gas Companies." (a) Every independent pro-

ducer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of §§ 154.91 to 154.102, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, state commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 Rate schedule defined. For the purpose of §§ 154.91 through 154.102 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on or after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or

charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 Changes in rate schedules. (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice,

subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (1) The date on which such filing is proposed to be made effective; (2) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 303

MARATHON OIL COMPANY, *Petitioner*

v.

BROOKLYN UNION GAS COMPANY, ET AL.,
Respondents

On Petition For Writ of Certiorari To The United States Court of Appeals, For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

Respondents disagree with Petitioner's statement of the questions presented.

1. The controlling question in this case is not, as contended by Petitioner, the construction of Section 4(d) of the Natural Gas Act, but whether the stay order of the

Court of Appeals for the Fifth Circuit in *Ohio Oil Company v. Federal Power Commission* not only authorized Ohio to collect increased rates without meeting the filing requirements of Order No. 174-A and Section 4(d) of the Act, but also authorized Ohio to retain such sums without restitution after the expiration of the stay order. This question was answered in the negative by the Court of Appeals, the same court which granted the stay order.

2. Petitioner's second question, based on the fact that the price increases it collected were the same as those allowed by the Commission to another producer who did file its proposed change of rates with the Commission, is not raised by the record in this case and is completely irrelevant, since here the Petitioner did not file its rate schedules or notice of change with the Commission, but instead sought to have the Court of Appeals hold the Commission's regulations invalid and obtained a stay of the regulation pending judicial review. Likewise, there is no question here of "just and reasonable" rates under the Natural Gas Act, since, as was said by the Court of Appeals, (Petitioner's Appendix, p. 4a, R. 837): "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations."

3. Petitioner's third question presented is two-fold in that it concerns (a) limitation, and (b) computation of interest. Both are matters of Texas substantive law which were, as we shall demonstrate, properly decided by the courts below.

Statement

This is a companion case to No. 300, Socony Mobil Oil Company, Inc. v. Brooklyn Union Gas Company, et al., No. 339, Transcontinental Gas Pipe Line Corporation v. Brooklyn Union Gas Company, et al., and No. 344, Brooklyn Union Gas Company, et al. v. Transcontinental Gas Pipe Line Corporation, all filed in this term. The four cases were a single case in the District Court, and, although separately docketed, were considered and decided together by the Court of Appeals and are before this court on a single record.

Respondent adopts the Statement of Facts in this case as set forth in the trial court's opinion (Petitioner's Appendix, pp. 9a-12a, R. 652-656), and approved by the Court of Appeals. (Petitioner's Appendix, pp. 2a and 3a, R. 835-837.)

Ohio's statement of the case requires comment and correction, however, in three particulars:

(a) On page 6, it is stated that:

> "Under date of January 25, 1957, immediately prior to the expiration of the stay of Order 174-A, Ohio filed with the Federal Power Commission its FPC Gas Rate Schedule No. 10, covering the sale of gas here involved (R. 576). This filing, when made, consisted of the basic Sun-Ohio contract of April 30, 1948, and supplements thereto, including supplements covering the price increases which had been placed in effect under the contract during the period of the court stay (R. 228, 576). In acting on this filing, the Commission not only accepted the basic contract, but also allowed to Ohio, without suspension, the full amount of the price increases which had taken place under the contract while the stay of Order No. 174-A was in effect." (R. 577).

By the manner in which the Commission action is stated, it is obvious that Ohio is seeking to have the inference drawn that the Commission retroactively determined the lawfulness of Ohio's increased rates. That such is not the case is apparent from the action of the Commission in accepting Supplement No. 8 to Ohio's Rate Schedule No. 10, the Ohio-Transco Contract. (Page 79 of Exhibit "B" to the Affidavit of Robert M. Vaughan to Ohio's Motion for Summary Judgment, R. 579, not printed, Tr. 681.) Supplement No. 8 filed by Ohio states that:

> "This Supplement takes effect only in the event that the lawful effective rate under 18 C.F.R. 154.92 for gas sold under Rate Schedule No. 10, after the filing date thereof, is the rate which was in effect on June 7, 1954 * * *."

The fact that the Commission accepted Supplement No. 8 under these terms shows that the Commission did in fact find that the lawful effective rate, even after Ohio's filing, until approval of the increase was the rate in effect on June 7, 1954. The Commission expressly so stated in its letter to Ohio of February 1, 1957 (Exhibit "A's' to Plaintiff's Reply to Ohio Oil Company's Brief in Support of Motion for Summary Judgment, not printed, Tr. 1288), saying that Ohio's filings

> "have been accepted for filing at the rate level specified in such rate schedules, or effective supplements for gas sold in interstate commerce for resale as in effect on June 7, 1954."

This is the only action the Commission could have taken, since its allowance of price increases could only operate prospectively from the date of filing. Furthermore, in its

letter to Ohio of August 21, 1957, the Commission pointed out that it would be necessary for Ohio "to refund the amounts charged in excess of the June 7, 1954 rates, for the period from June 7, 1954 * * * until the dates of acceptance of an increased rate by the Commission." (R. 601).

(b) Ohio's petition, pages 6 and 7, emphasizes the Commission's allowance to Sun Oil Company of the prices charged by Sun for the sale of gas to Transco. The prices fixed by the Federal Power Commission for Sun have no possible relevancy here. No one can say that the Commission would have allowed the same prices had Ohio filed. Furthermore, Ohio cannot escape the fact that Sun submitted to the Commission's jurisdiction and filed rate schedules and notices of change as required by the Natural Gas Act as implemented by the orders of the Commission, while Ohio deliberately elected to obtain a stay order and collect increased rates during its pendency without so filing.

(c) On Page 8, Ohio states that the district court found that the only lawful rate in effect during the stay was the June 7, 1954 rate "as established by the order of the Federal Power Commission," that is, Order No. 174-A. Ohio's quotation and citation to the opinion are accurate, but Ohio neglects to add that the courts below found that changes in rates were prohibited, not only by Order No. 174-A, but by Section 4(d) of the Natural Gas Act. See, e.g., Petitioner's appendix, pp. 3a, 4a, and 17a. The District Court said:

> "Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission." (Petitioner's Appendix, p. 17a, R. 662).

The Court of Appeals, in discussing the trial court's opinion, said:

> "As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained." (Petitioner's Appendix, p. 3a, R. 836)

I.

The Decision Below Is Clearly Correct.

This is actually a very simple case. After June 7, 1954, in order for Ohio to raise its rates to Transco, it was necessary for Ohio to file a notice of its intention to raise rates with the Federal Power Commission and to secure approval of the increase from the Commission. Instead of so filing, Ohio, by appealing the Commission's Order No. 174-A to the Court of Appeals, sought in effect to relitigate the holding of this Court in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, and in connection with its appeal obtained a stay order pending judicial review of the Commission's regulations. While the stay order was in effect, it collected increased rates and has now been ordered to make restitution of such increases.

To hold that the stay order of the Fifth Circuit permits Ohio to retain its increased charges would be to permit the courts by stay order to administratively determine the effective rates for sale of gas to interstate pipelines by independent producers. The Fifth Circuit has passed upon and construed the effect of its own stay order. Its opinion makes it clear that it did not, by issuing the stay order, intend to do indirectly what it could not do directly, that is, to invade the administrative field reserved exclusively to the Federal Power Commission.

II.

There Is No Important Question Of Statutory Construction Presented By The Case.

Ohio argues that this case presents an important question of statutory construction which should be resolved by this court. Ohio's argument in effect is that Section 4 of the Natural Gas Act is not a self-executing statutory provision and that the words "such rate" in Section 4 (d) refer only to a filed rate. It seems inconceivable that by refusing to file its rates as required by Section 4 (c) of the Act (a criminal violation of the Act), a natural gas company could then lawfully raise its rates without giving notice to the Commission and to the public as required by Section 4 (d) of the Act. Early in the game Ohio admitted that such was not the case and that it relied solely on the stay order as its mandate to retain excess charges collected during its pendency. In its Reply Brief in the trial court at page 6 Ohio said:

> "Of course, if the Court stay had not been granted, and if Ohio had not made any rate filings and had

> not given the notice required by Order No. 174-A, the June 7, 1954, price would have been and would have remained the lawful price."

In No. 300, Mobil recognizes that the Court of Appeals decision "realistically evaluated * * * demonstrates the stay order affected nothing, protected nothing" (Mobil's Petition, p. 10).

Ohio simply ignores the fact that the stay order, while relieving Ohio temporarily of the filing requirements, did not relieve it from the Section 4 (d) prohibition against raising its rates without notice. The stay order, of course, was intended only to maintain the status quo during the litigation and did not adjudicate any rights of Ohio to increased rates.

Section 4 of the Natural Gas Act is concerned with rates for any "sale subject to the jurisdiction of the Commission." Its filing provisions do not deal with filing "rates" but with filing "schedules" of rates. Section 4(d) prohibits changes in "any such rate", that is, in any rate subject to the jurisdiction of the Commission, except after notice to the Commission. The initial filing of schedules is not a prerequisite to the applicability of the prohibition against changes in rates.

The Petitioner not only disregards the language of the Act, but also the case of *Natural Gas Pipe Line Company of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. denied 356 U.S. 957, relied on by both courts below. In the *Harrington* case, the court ordered restitution of increased rates collected, not pursuant to a change in rates under Section 4(d) of the Act, but in accordance with an order of the Oklahoma Corporation Commission subsequently held to be invalid. The decision was based squarely upon the

prohibition against change contained in Section 4(d) of the Act. The *Harrington* case specifically recognized that there might be a delay in the issuing of regulations, that did not mean that there was no effective lawful rate, but that "the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission." 246 F. 2d at 919. The subsequent case of *Bel Oil Corporation v. Federal Power Commission*, 255 F. 2d 548 (C.A. 5, 1958), cert. denied 358 U.S. 804, made it plain that the applicable contract rate was that rate in effect on June 7, 1954, so even though Order No. 174-A was stayed, the contract rate in effect on June 7, 1954 was still the only effective lawful rate.

In any event, the question of statutory construction which Ohio claims to exist is not one of great importance to anyone other than the parties to this litigation, since the validity of Order No. 174-A has long since been established and the Commission and all independent producers are now operating under the provisions of Order No. 174-A.

III.

The Opinion Of The Court of Appeals Does Not Conflict With The Decision Of This Court In The *Montana-Dakota* Case.

Under its point II, Ohio asserts that the decisions of the courts below are in conflict with the decision of this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246. There is no conflict. *Montana-Dakota* was a reparation case. This is a restitution case to recover an unlawful charge, as distinguished from reparations wherein recovery is sought of past charges which were allegedly "unjust and unreasonable," even though they had

been fixed or approved by the Federal Power Commission or other administrative agency having jurisdiction. There is no issue in this case with respect to the justness and reasonableness of the rates. There is only the question of the effect of the stay order upon the Petitioner's failure to file its rate schedules with the Federal Power Commission.

The possibility of a "windfall" played no part in the decision of this Court in *Montana-Dakota*. There the petitioner contended that the rates charged were unreasonable and were void because established through fraud perpetrated by an interlocking directorate. The court held, first, that the courts have no jurisdiction to consider the question of the reasonableness of rates under the Federal Power Act, because that is a matter exclusively within the jurisdiction of the Commission. Second, the court held that the action for fraud could not arise under the Federal Power Act, but was a common-law right not maintainable in Federal court in the absence of diversity of citizenship. Third, the court held that the case should not be remanded to the district court to refer issues to the Federal Power Commission for decision, because the Commission would itself be without jurisdiction to grant reparations, and this lack of jurisdiction should not be circumvented by judicial action.

The *Montana-Dakota* case does, however, support the trial court's decision that Ohio is not entitled to any other rate during the period in question than that fixed as of June 7, 1954. The Court said at 341 U.S. 251:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise

of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

It should also be pointed out that Ohio has no standing to assert the defense of "windfall". Ohio assumes that the price increases paid by Respondents were passed on to Respondents' customers, and asserts this as a defense. It is settled, however, that this defense is not available to Ohio. In *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, a suit by a shipper to recover reparations from the railroads, Mr. Justice Holmes said at page 533:

"The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonble charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote circumstances to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law, and it does not inquire into later events."

The holding of this case was expressly carried forward into the field of charges paid for natural gas by the case of *Central States Electric Co. v. City of Muscatine*, 324 U.S. 138. In that case, Central purchased gas at wholesale from Pipeline. Citing the *Southern Pacific* case, the court said at 324 U.S. 145:

> "Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers."

IV.

The Judgment In This Case Is Not In Conflict With The Decision Of This Court In *Atlantic Coast Line v. Florida.*

Ohio's third point is that the judgment in this case is a departure from accepted principles of law as established by this court in *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301. That case is a leading case in the field of restitution, but is of no benefit to Ohio. On the contrary, that case actually lends support to the judgment of the courts below awarding restitution to the Respondents.

In *Atlantic Coast Line*, the railroad had been required by order of the Interstate Commerce Commission to collect increased rates. The order of the Commission was subsequently set aside as void "solely upon the ground that the facts supporting the conclusion were not embodied in the findings." (295 U.S. 311) The Court expressly recognized as a rule of general application the rule of *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, "that a party against whom an erroneous judgment or decree has been carried into effect is entitled,

in the event of a reversal, to be restored by his adversary to that which he has lost thereby." But this Court said that the rule was not without exceptions, and found that the circumstances in that case constituted an exception, because the Commission order was erroneous only because of the failure of the Commission to include the facts in its findings. The Court said at 295 U.S. 314 that when the federal court looks at that case: "It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays." In this case, there was no order fixing higher rates which Ohio was required to obey, and there were no "blunders of procedure," no "administrative delays." Ohio refused to submit its rates to the Commission and by affirmative action, sought a stay of Order No. 174-A. At Ohio's instigation, a stay was granted by the Court of Appeals. This cannot be called a "blunder of procedure" or "administrative delay" but for which the rate charged would have been lawful.

The result for which Ohio here contends is exactly the opposite of that found by Justice Cardozo to exist in the *Atlantic Coast Line* case, when he said at page 316:

> "The rates now recognized as just are not a fabrication of the judges. They have not been fixed by a court to take effect thereafter. They are the rates prescribed for the future by the appointed administrative agency * * *."

Ohio asks this Court to find that when the Court of Appeals issued the stay, that court fabricated rates, and fixed them to take effect thereafter. Here there was a rate

prescribed for the future by the appointed administrative agency, as well as by the Natural Gas Act (the contract rate in effect on June 7, 1954), and that was not the rate charged by Ohio.

The majority opinion in the *Atlantic Coast Line* case demonstrates that this case does not constitute a departure from the general rule there stated by the Court. Even under the facts of that case, four of the justices thought that restitution should have been required.

On pages 16 and 17 of its petition, Ohio sets forth what it considers to be equitable considerations in its favor. Suffice it to say that Ohio's situation is of its own making. Ohio was the moving party in obtaining the stay order on which it now relies to permit it to retain rates which were never filed with or approved by the Federal Power Commission. As was so aptly said by the district court (Petitioner's Appendix, p. 19a, R. 664):

> "In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them."

V.

The Decision Of The Courts Below Does Not Invade The Domain Of Administrative Action, But Rather Ohio Seeks To Have The Courts Enter This Area.

Under its point IV, Ohio states that the courts below in effect determined what was a "just and reasonable" rate

by deciding what was the "lawful" rate for the period in question in this case, because a rate could not be unlawful unless it has been specifically found to be unjust and unreasonable by the Commission. The clear error in this position demonstrates that this point is not raised by the record in this case and creates no issue for decision by this Court.

Under Ohio's statement, any rate would be lawful so long as it had not been found by the Commission to be not "just and reasonable". This would mean that any such rate, even though unfiled would be lawful. But, as Ohio has previously admitted in the trial court, (see pages 7-8, supra), this is not true. An increased rate may be eminently just and reasonable, but if it has not been filed with the Commission it is not the lawful rate. Ohio's reasoning under this point completely overlooks the fact that to give the stay order the construction of permitting Ohio to obtain rates in excess of its June 7, 1954 rate would be to permit the fixing of effective lawful rates by the courts, which they may not do. Even the standard of restitution suggested by Ohio, the difference between the contract prices and what might be determined to be a "just and reasonable" rate, would be *improper because the courts* would thereby be invading the administrative domain. This point is not raised by the record in this case and raises no issue for decision by this court.

VI.

The Questions Of Limitations And The Allowance Of Interest Were Both Correctly Decided By The Courts Below, And Are Both Questions Of Texas Substantive Law Raising No Issue Of Importance For This Court To Consider.

Under its point V, Ohio raises two issues. The first is the defense of limitations. The trial court properly held that the cause of action for restitution did not arise until the dissolution of the stay orders on February 1, 1957. Had an attempt been made prior to that time to recover the rates collected in excess of the June 7, 1954 rate, Ohio could and doubtless would have replied that the issue involved in such suit was the validity and applicability to Ohio of Order No. 174-A and Section 4(d) of the Natural Gas Act, and that no overcharges could be recovered until that issue was settled. The obligation to refund the excess amount collected together with interest thereon from the date of each payment to Ohio, arose on the date when the stay order was dissolved. *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781; *Cavitt v. Amsler*, 242 S.W. 246 (Tex. Civ. App., 1922), error dismissed; *Williams v. The Pure Oil Co.*, 124 Tex. 341, 78 S.W. 2d 929 (1935).

With respect to the allowance of interest, under Texas law, which applies here, it is settled that in a case such as this the award of interest is not discretionary, but as a matter of law respondents are entitled to interest, not from the date of the dissolution of the stay order, but from the date when the principal damages were fixed by conditions existing at the time the injury was inflicted, that is at the time of each payment to Ohio. *Texas Company v. State*, 154 Tex. 494, 281 S.W. 2d 83, 89, 92 (1955). Furthermore, even under the decisions of this court, at the time the cause of action arose it included the claim for interest from the date of each payment. *Baltimore & Ohio Railroad Co. v. United States*, supra.

Both of these questions, the applicability of the Texas statute of limitations and the application of the Texas law with respect to the allowance of interest, are matters of local law which present no issue of importance to this court for decision, and both issues were correctly decided below.

CONCLUSION

In view of the foregoing, Respondents respectfully pray that the petition for a writ of certiorari by Marathon Oil Company be denied.

Respectfully submitted,

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September 7, 1962

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition filed herein by Respondents confirms Petitioner's analysis of the true nature of the issues presented in this case and underscores the need for a grant of certiorari by this Court.

Stripped of all extraneous contentions, the claim asserted by Respondents in this litigation, and allowed by the courts below, is this: *Petitioner criminally violated Section 4 of the Natural Gas Act* when it collected its price increases under its contract without first making filings with the Federal Power Commission *and, for this reason alone, Petitioner must make restitution* to Respondents who are customers of Petitioner's pipe line customer (Br. in Opp., pp. 7-8).

As we shall show in the paragraphs which follow, this is clearly not the law.

Throughout this litigation, Petitioner has taken the position that the collection of its contract prices during the court stay of FPC Order No. 174-A was *lawful* and that there is no basis in law or in equity for the recovery allowed by the courts below. We adhere to that position. However, now that the true basis for the claim asserted by Respondents has been made clear, the answer thereto is simple and obvious: Even if it be assumed that Petitioner's collection of the price increases was a violation of the Act, punishable by appropriate action, this would not give Respondents a right to bring suit for such moneys, or authorize the entry of a judgment awarding a recovery thereof, *because the Natural Gas Act contains no provision authorizing third parties in institute actions arising out of violations of its provisions.*

The jurisdiction and powers of the courts in respect to violations of the Natural Gas Act or the regulations issued thereunder are limited to those prescribed in Sections 20, 21 and 22 of the Act. 15 U.S.C. 717s, 717t and 717u. Section 20, 15 U.S.C. 717s, authorizes the

Commission to institute actions in the United States district courts to enjoin violations of the Act or regulations, or to compel compliance therewith, and empowers the Attorney General to institute any necessary criminal proceedings. Section 21, 15 U.S.C. 717t, prescribes the penalties which may be imposed for willful violations and Section 22, 15 U.S.C. 717u, vests in the district courts exclusive jurisdiction of violations of the Act and of suits brought to enforce any liability or duty created by, or to enjoin any violation of, the Act or the regulations and orders issued thereunder.

A reading of the aforementioned sections of the Act makes it clear that the only party authorized to institute proceedings arising out of violations of the Natural Gas Act is the Federal Power Commission, acting either directly or through the Attorney General. The Act does not vest any such right in third parties, such as the Respondents in this case.

The absence of a right in third parties to maintain actions to recover for violations of the Natural Gas Act is confirmed by numerous cases interpreting counterpart provisions in similar legislation. An example is to be found in the *Consolidated Freightways* litigation involving the Motor Carrier Act[1] of August 9, 1935, 49 Stat. 543, as amended, 49 U.S.C. 301, et seq., the enforcement provisions of which are substantially the same as those embodied in Sections 20 and 22 of the Natural Gas Act (see Section 222, 49 U.S.C. 322). In the *Consolidated Freightways* case, a district court, in a suit by the Interstate Commerce Commission, had enjoined, as un-

[1] Also cited as Part II of the Interstate Commerce Act.

lawful, the uncertificated operations of a motor carrier. *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816 (C.A. 9, 1951), cert. den. 342 U.S. 830. Thereafter, a certificated carrier brought suit to recover damages based on the unlawful activity of its competitor. First the federal courts (*Consolidated Freightways* v. *United Truck Lines*, 216 F. 2d 543 (C.A. 9, 1954), cert. den. 349 U.S. 905) and later the state courts (*Consolidated Freightways* v. *United Truck Lines*, 216 Ore. 515, 330 P. 2d 522 (1958), cert. den. 359 U.S. 1001) denied recovery on the ground that the Motor Carrier Act excludes a private remedy in the courts for violations of its provisions.[2] In this connection, the Supreme Court of Oregon stated (330 P. 2d at 529):

> * * * it is our opinion that the Congress intended to vest in the Interstate Commerce Commission the sole authority to enforce the provisions of the Act, precluding private relief in both federal and state courts either by way of injunction or damages. Therefore the plaintiff is not entitled to recover in this action.

Another statute which limits suits for violations thereof to those authorized by its provisions is Section 3 of the Robinson Patman Act of June 19, 1936, 49 Stat. 1526, 1528, 15 U.S.C. 13a. This is established by this Court's decision in *Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 967. See also *United States* v. *Parkinson*, 240 F. 2d 918 (C.A. 9, 1956), where restitution was denied in a suit arising out of a violation of Section 301(a) of the Food, Drug and Cosmetic Act,

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[2] The enforcement provision of Part II of the Interstate Commerce Act, 49 U.S.C. 322, is thus different from counterpart provisions in Part I, the railroad portion of the Act. See 49 U.S.C. 8.

21 U.S.C. 331(a), on the ground that the district court had no jurisdiction to give such relief under the statute. In this connection, the court stated (240 F. 2d at 922):

> The holding of the Court is that neither the statute nor any other legislation gives the District Court jurisdiction to grant the relief sought. The equitable powers of the court cannot be invoked in the situation because of lack of statutory authority, express or implied.

See also and compare *San Diego Unions* v. *Garmon*, 359 U.S. 236, 246-247.

In its consideration of the Petition filed herein, the Court is urged to keep in mind that the claim asserted by Respondents is not a common-law contract claim, since Petitioner collected only its contract prices and no more.[3] It is a claim based *solely* on an alleged violation of a statute. What Respondents are really seeking to accomplish, therefore, is the imposition of a statutory penalty when no such remedy is provided by the statute in question. This should not be allowed. As was stated in the *Parkinson* case, *supra*, "Anything which savors of a penalty should not be permitted unless Congress has expressly so provided, since the spirit of equity abhorred such punitive measures." 240 F. 2d at 922.

In our Petition for a Writ of Certiorari, we have shown that the court below has erroneously decided an important question of statutory construction which

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[3] This completely distinguishes the present case from *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957, relied on so heavily by Respondents (Br. in Opp., 8-9).

should be corrected by this Court, that the decision below is in conflict with controlling decisions by this Court in the law of restitution,[4] and that the lower court's action invades the domain of administrative action, since the Federal Power Commission has never found that the rate collected by Petitioner is not a "just and reasonable" rate under Section 4 of the Natural Gas Act.[5] Moreover, the Commission has never taken any action. As a consequence, the question as to what action the Commission might have taken under its statutory powers is not here presented, because no action was taken.

For all of these reasons, plus the now obvious fact that the recovery allowed by the court below is one

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[4] Respondents chide us for placing in the record the action of the Commission in respect to the rate allowed for Sun Oil Company's sale under the same contract from the same field and the rate ultimately allowed to Petitioner for this same sale (Br. in Opp., p. 2). Respondents miss the point of this evidence. It establishes the fact that the pipe line purchaser and Respondents paid no more for the gas than it was worth and no more than the rate allowed by the Commission. Respondents are thus unable to show any *financial injury*, and indispensable element of a claim for restitution.

[5] Respondents suggest that the Commission, in a letter dated August 21, 1957, advised Petitioner that it would be necessary for Petitioner to refund the price increases collected by Petitioner (Br. in Opp., pp. 4-5). This is not the case. The letter referred to was not from the Commission but from its Acting Secretary, without Commission direction. When Petitioner, in a subsequent letter dated October 15, 1957 (annexed to Petitioner's Reply Brief in Support of Summary Judgment, R. 642) advised the Acting Secretary that his suggestion was contrary to discussions had with the Commission when Petitioner made its filings, no further word was received by Petitioner and the Commission has taken no action in respect to the matter.

not authorized by the Natural Gas Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1962